Comments of Luminant

*Error Correction of the Area Designations for the 2010 1-Hour Sulfur Dioxide ($SO_2$) Primary National Ambient Air Quality Standard (NAAQS) in Freestone and Anderson Counties, Rusk and Panola Counties, and Titus County in Texas*

84 Fed. Reg. 43,757 (Aug. 22, 2019)

Luminant[1] submits these comments on the U.S. Environmental Protection Agency's ("EPA") proposed *Error Correction of the Area Designations for the 2010 1-Hour Sulfur Dioxide ($SO_2$) Primary National Ambient Air Quality Standard (NAAQS) in Freestone and Anderson Counties, Rusk and Panola Counties, and Titus County in Texas* ("Proposed Rule").[2] In the Proposed Rule, EPA proposes to find that it erred in its prior nonattainment designations for three areas in Texas[3] and, therefore, proposes to correct its error and designate those areas as unclassifiable.[4] Luminant agrees that EPA erred and, therefore, supports EPA's Proposed Rule to designate these areas unclassifiable.

## I. Luminant Has a Substantial Interest in the Proposed Rule

Luminant has a direct and substantial interest in the Proposed Rule. Luminant is a competitive power generation business, with approximately 41,000 megawatts ("MW") of natural gas, nuclear, coal, and solar generation as of 2018. Moreover, Luminant is the owner of the Big Brown, Martin Lake, and Monticello power plants, which are located in the three areas at issue in this Proposed Rule. In early 2018, Luminant permanently retired the Big Brown and Monticello plants.[5] Luminant continues to

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[1] These comments are submitted by Luminant Generation Company LLC (the owner of the Monticello Power Plant and the owner and operator of the Martin Lake Power Plant, "Luminant Generation") and Big Brown Power Company LLC (the owner of the Big Brown Power Plant, "BBPC") (Luminant Generation and BBPC are collectively referred to herein as "Luminant").

[2] 84 Fed. Reg. 43,757 (Aug. 22, 2019).

[3] 81 Fed. Reg. 89,870 (Dec. 13, 2016) ("Texas Nonattainment Designations").

[4] 84 Fed. Reg. at 43,757.

[5] Luminant, *Luminant Announces Decision to Retire Its Monticello Power Plant* (Oct. 6, 2017), https://www.luminant.com/luminant-announces-decision-retire-monticello-power-plant/; Luminant,

operate the Martin Lake Power Plant, which is a 2,250 MW coal-fueled electric generating unit ("EGU") located in Rusk County, Texas. Martin Lake generates enough electricity to power approximately 1.25 million homes and continues to be an integral part of Luminant's diverse generation mix and power generation within the State of Texas, as underscored during the recent August heat wave when the Electric Reliability Council of Texas ("ERCOT") set a new all-time peak demand record and went into an Energy Emergency Alert on two days due to a shortage of operating reserves.[6]

As explained in Luminant's prior comments on the Texas Nonattainment Designations, the Texas Nonattainment Designations did not give appropriate deference to the State of Texas's preference to rely on monitoring rather than modeling for the sulfur dioxide ($SO_2$) National Ambient Air Quality Standard ("NAAQS") designations in the state.[7] Moreover, the Texas Nonattainment Designations were unlawful because the record did not establish information "clearly demonstrating" that designations of nonattainment were appropriate.[8] Modeling is, at best, an informed guess about what actual conditions are occurring, and, in this case, Sierra Club's modeling (EPA's only basis for the nonattainment designations) was further biased, flawed, and unreliable.[9]

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*Luminant to Close Two Texas Power Plants* (Oct. 13, 2017), https://www.luminant.com/luminant-close-two-texas-power-plants/.

[6] ERCOT, *Extreme Heat Across the State Results in High Usage, Need for Conservation* (Aug. 13, 2019), http://www.ercot.com/news/releases/show/187793.

[7] Comments of Luminant on Proposed Texas Nonattainment Designations, Dock. ID No. EPA-HQ-OAR-2014-0464-0328, at 16-19 (Mar. 31, 2016).

[8] *See generally id.*

[9] *Id.* at 24-32.

## II. The Proposed Rule Is Supported by the Statutory Structure of the Clean Air Act and EPA's Prior Actions

The prior Texas Nonattainment Designations were inconsistent with the Clean Air Act and EPA's prior actions with respect to the 2010 $SO_2$ NAAQS. The Proposed Rule is necessary to correct these prior errors and to correctly designate the three Texas areas as unclassifiable.

### A. The Clean Air Act Gives States the Primary Authority to Implement the NAAQS

The Clean Air Act creates a cooperative federalism structure that divides authority between the federal government and the states.[10] Within this structure, "air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments."[11] With respect to the NAAQS, the Clean Air Act requires EPA to set the NAAQS for certain pollutants, including $SO_2$.[12] EPA is required to review the NAAQS at five year intervals and make revisions where necessary.[13] On June 22, 2010, EPA revised the primary $SO_2$ NAAQS to establish a new 1-hour average standard of 75 parts per billion (ppb).[14]

However, while "[t]he Act assigns responsibility to the EPA for identifying air pollutants and establishing [the NAAQS,] . . . [t]he states, by contrast, bear the primary responsibility for implementing those standards."[15] Accordingly, "[t]he structure of the Clean Air Act indicates a congressional preference that states, not EPA, drive the regulatory process."[16] For example, the State of Texas, through the Texas Commission on Environmental Quality ("TCEQ"), is primarily responsible for assuring air quality

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[10] *Luminant Generation Co. v. EPA*, 675 F.3d 917, 921 (5th Cir. 2012).

[11] 42 U.S.C. § 7401(a)(3).

[12] *See id.* § 7409.

[13] *Id.* § 7409(d).

[14] 75 Fed. Reg. 35,520 (June 22, 2010).

[15] *Luminant Generation Co.*, 675 F.3d at 921 (internal citations and quotations omitted).

[16] *Texas v. EPA*, 829 F.3d 405, 411 (5th Cir. 2016).

throughout Texas. Consistent with Congress's goals, each state is to implement the NAAQS through a State Implementation Plan ("SIP") that specifies how the NAAQS will be achieved and maintained in that state.[17]

Further, the Clean Air Act requires that within one year after a NAAQS is established or revised, each state must "submit to [EPA] a list of all areas (or portions thereof) in the State, designating as[:]

i. nonattainment, any area that does not meet . . . [the NAAQS],

ii. attainment, any area . . . that meets the [NAAQS], or

iii. unclassifiable, any area that cannot be classified on the basis of available information as meeting or not meeting the [NAAQS]."[18]

Relying on the designations submitted by the states, the Clean Air Act requires EPA to designate areas as nonattainment, attainment, or unclassifiable no later than three years after promulgation of a new or revised NAAQS.[19] Although EPA issues the final designations, states are integrally involved in the process. Pursuant to Section 107, EPA must "promulgate the designations of all areas (or portions thereof) submitted [by the states] . . . ."[20] EPA may only modify the designations made by the states if "necessary."[21] In doing so, EPA must notify the state of its modification and provide the state with an opportunity to respond.[22] Following the designation of areas within a state, the state has "virtually absolute power in allocating emission limitations so long as the national standards are met . . . ."[23]

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[17] 42 U.S.C. § 7410(a).

[18] *Id.* § 7407(d)(1)(A).

[19] The statute has a two-year deadline with the possibility of an extension for one more year if the EPA Administrator "has insufficient information to promulgate the designations." *Id.* § 7407(d)(1)(B)(i).

[20] *Id.*

[21] *Id.* § 7407(d)(1)(B)(ii).

[22] *Id.*

[23] *Union Elec. Co. v. EPA*, 427 U.S. 246, 267 (1976).

### B. EPA's Proposal to Correct the Three Texas Designations to Unclassifiable Is Supported by EPA's Prior Actions and Implementation of the $SO_2$ NAAQS

As noted above, EPA issued its final rule updating the $SO_2$ NAAQS on June 22, 2010.[24] In accordance with its obligation under the Clean Air Act, on June 2, 2011, Texas submitted its designations to EPA, specifying which geographic areas within Texas met or failed to meet the 1-hour $SO_2$ NAAQS and which areas could not be classified based on available information.[25] In its submission, TCEQ designated as nonattainment areas with monitored $SO_2$ regulatory design values exceeding 75.4 ppb, attainment for areas with monitored $SO_2$ regulatory design values of 75.4 ppb or less, and unclassifiable for all other counties in Texas.[26]

Although the Clean Air Act imposes a two-year deadline on EPA to complete designations after a new or revised NAAQS is promulgated,[27] EPA may extend the deadline by up to one year if the agency "has insufficient information to promulgate the designations."[28] Based on this provision, on August 3, 2012, EPA extended the promulgation deadline for the 2010 1-hour $SO_2$ NAAQS.[29] EPA explained that another year was needed to resolve "outstanding issues and uncertainty regarding the most appropriate implementation approach . . . ."[30] With its extension, EPA's new deadline for completing designations was June 3, 2013.

EPA responded to Texas's designations on February 7, 2013, stating that it intended to designate as nonattainment areas in the state where existing monitoring data from 2009-2011 indicated violations

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[24] 75 Fed. Reg. at 35,520; 40 C.F.R. § 50.17(a)-(b).

[25] Letter from Rick Perry, Governor, Texas, to Alfredo Armendariz, EPA Reg'l Adm'r, Region 6 (June 2, 2011).

[26] *Id.*

[27] 42 U.S.C. § 7407(d)(1)(B)(i).

[28] *Id.*

[29] 77 Fed. Reg. 46,295 (Aug. 3, 2012).

[30] *Id.* at 46,297.

of the 1-hour $SO_2$ standard.[31] EPA stated that its review of the most recent monitoring data from Texas showed no violations of the 2010 $SO_2$ standard in any area.[32] However, EPA said it was "not yet prepared to propose designation action in Texas" and was, therefore, "deferring action to designate areas in Texas."[33] EPA said it intended to "proceed with designation action in Texas once additional data [was] gathered pursuant to [EPA's] comprehensive implementation strategy."[34]

In February 2013, EPA issued the comprehensive implementation strategy ("Strategy Paper") mentioned in its February 7, 2013 response to Texas.[35] In the Strategy Paper, EPA explained that the next step for implementation would be to propose a rulemaking to characterize air quality in priority areas pursuant to a timeline identified in the rule.[36]

On May 13, 2014, EPA proposed the rulemaking contemplated in its Strategy Paper, namely, the Data Requirements Rule ("DRR").[37] The proposed DRR set forth a process for characterizing current air quality in areas with large sources of $SO_2$ emissions either through monitoring or modeling techniques, as well as a timetable for air agencies to submit such data to EPA to inform the agency's designation decisions for these areas.[38] EPA explained that the proposed timeline was responsive to concerns that states have flexibility and sufficient time to pursue either the monitoring or modeling pathway for

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[31] Letter from Ron Curry, EPA Reg'l Adm'r, Region 6, to Rick Perry, Governor, Texas (Feb. 7, 2013).

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] EPA, *Next Steps for Area Designations and Implementation of the Sulfur Dioxide National Ambient Air Quality Standard* (Feb. 6, 2013) ("Strategy Paper").

[36] *Id.*

[37] 79 Fed. Reg. 27,446 (May 13, 2014).

[38] *Id.* at 27,456. Specifically, EPA noted that although "[t]he area designations process typically relies on air quality concentrations characterized by ambient monitoring data collected by the air agency," EPA would allow states to rely on monitoring or modeling to inform their future designations in a timely manner. *Id.* at 27,448, 27,456.

identified sources and also allowed states to account for $SO_2$ reductions that would occur over the next several years as a result of trends in the industry and implementation of national and state level programs.[39] In addition to including modeling and monitoring information submittal deadlines, EPA also included in the proposed DRR "anticipated implementation milestones that are important in the $SO_2$ designations and implementation process," including intended designation deadlines.[40]

Luminant commented on the proposed DRR, generally supporting the flexibility the rule provided states to select monitoring or modeling to characterize air quality.[41] Luminant raised concerns regarding the use of modeling for NAAQS designations, including AERMOD's tendency to over-predict $SO_2$ concentrations, and explained that it was not appropriate to designate an area as nonattainment without actual measured data obtained from monitors.[42] Further, Luminant urged EPA to designate as unclassifiable areas that have not been designated due to lack of information.[43]

On August 21, 2015, EPA finalized the DRR.[44] EPA noted that because the existing $SO_2$ monitoring network was limited, it was also allowing for modeling to characterize air quality in the vicinity of large sources of $SO_2$ emissions.[45] EPA also set forth a program implementation timeline, but unlike the

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[39] *Id.* at 27,456.

[40] *Id.* For either the modeling or monitoring pathway, a protocol would be established for determining the analysis approach. The results of a modeling approach would be available in early 2017, such that a designation would be issued by EPA by the end of 2017. A monitoring approach would extend from 2017-2019, and a designation would be issued by EPA by the end of 2020. *Id.* at 27,457.

[41] Comments of Luminant on Proposed DRR, Dock. ID No. EPA-HQ-OAR-2013-0711-0090 (July 14, 2014).

[42] *Id.* at 6.

[43] *Id.* at 3.

[44] 80 Fed. Reg. 51,052 (Aug. 21, 2015); 40 C.F.R. §§ 51.1200-51.1205.

[45] 80 Fed. Reg. at 51,053.

timeline in the proposed DRR, the timeline in the final DRR did not include intended designation deadlines.[46]

EPA explained that it avoided setting a timeline for designations in the final DRR because on March 2, 2015, just months before the DRR was finalized, the U.S. District Court for the Northern District of California entered a consent order proposed by Sierra Club and the National Resources Defense Council that required EPA to meet mandatory deadlines for issuing $SO_2$ NAAQS designations ("Consent Decree").[47] The first round of the timeline in the Consent Decree required EPA to designate areas around large sources of $SO_2$ emissions by July 2, 2016.[48] Because of the short time frame for EPA to issue the first round of designations under the Consent Decree, sources affected by the first round under the Consent Decree would not have time to gather three years of monitoring data, as provided for under EPA's Strategy Paper and the proposed DRR. Recognizing this, several commenters, including Luminant and Texas, urged EPA to designate areas as "unclassifiable" where actual data (*i.e.*, monitoring data) was not available to inform a decision, as required by the Clean Air Act.[49] Importantly, the district court made clear in its order entering the Consent Decree that "the appropriate remedy in a 'deadline' case such as

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[46] *Compare id.* at 51,064 *with* 79 Fed. Reg. at 27,456-57.

[47] 80 Fed. Reg. at 51,064; *see also Sierra Club v. McCarthy*, No. 3:13-cv-3953, 2015 WL 889142 (N.D. Cal. Mar. 2, 2015). In the docket, Case No. 3:13-cv-3953, the Consent Decree is Doc. No. 163 (Mar. 2, 2015) ("Consent Decree").

[48] Consent Decree ¶ 1. Specifically, the Consent Decree required EPA to issue final designations by July 2, 2016, for areas that "contain any stationary source that has not been 'announced for retirement' . . . and that . . . emitted more than 16,000 tons of $SO_2$ in 2012 or [] emitted more than 2,600 tons of $SO_2$ and had an annual average emission rate of 0.45 lbs $SO_2$/Mmbtu or higher in 2012." *Id.* The two other deadlines set forth in the Consent Decree corresponded with EPA's anticipated schedule for future rounds of $SO_2$ designations in the DRR (*i.e.*, Dec. 2017 as the date by which EPA must issue final designations for all areas except those with monitoring networks that commenced operation on January 1, 2017, and December 2020 as the date by which EPA must issue final designations for the remainder of the country). *Id.* ¶¶ 2, 3; *see also* 80 Fed. Reg. at 51,064.

[49] Comments of Luminant on Proposed Consent Decree, Dock. ID No. EPA-HQ-OGC-2014-0421-0119, at 4 (July 2, 2014); Comments of TCEQ on Proposed Consent Decree, Dock. ID No. EPA-HQ-OGC-2014-0421-0018, at 1 (July 1, 2014); Comments of the State of Texas, et al. on Proposed Consent Decree, Dock. ID No. EPA-HQ-OGC-2014-0421-0122, at 2 (July 2, 2014).

this is to require EPA to issue designations pursuant to a schedule, *not to mandate that EPA issue any particular designation.*"[50]

On March 20, 2015, EPA issued updated guidance for $SO_2$ designations ("Updated Guidance").[51] In the Updated Guidance, EPA stated that it was required to operate pursuant to the Consent Decree and asserted that the Consent Decree's expedited deadline for the larger sources of $SO_2$ did not provide sufficient time for monitoring.[52] Importantly, however, EPA stated that "[i]n the absence of information clearly demonstrating a designation of 'attainment' or 'nonattainment,' the EPA intend[ed] to designate the area as 'unclassifiable' when it takes action pursuant to the court order."[53] EPA explained that the second and third designation deadlines set forth in the Consent Decree, which correspond with the designation deadlines set forth in the proposed DRR and are supported by the data collection timelines in the final DRR, would be informed by information provided by states pursuant to the DRR, including monitoring data.[54]

On March 20, 2015, EPA also sent TCEQ a letter updating TCEQ on its progress in implementing the NAAQS.[55] EPA listed twelve EGUs in Texas as meeting the criteria for the first round of designations under the Consent Decree, including four power plants owned by Luminant: Big Brown, Martin Lake,

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[50] *Sierra Club,* 2015 WL 889142, at *11 (emphasis added).

[51] Memorandum from Stephen D. Page, Dir., EPA Office of Air Quality Planning & Standards, to Reg'l Air Div. Dirs., Regions 1 – 10, *Updated Guidance for Area Designations for the 2010 Primary Sulfur Dioxide National Ambient Air Quality Standard* (Mar. 20, 2015) ("EPA's Updated Guidance").

[52] *Id.* at 2-3.

[53] *Id.* at 5 (emphasis added). EPA made the same statement in its March 2011 Guidance. *See* Memorandum from Stephen D. Page, Dir., EPA Office of Air Quality Planning & Standards, to EPA Reg'l Air Div. Dirs., Regions 1-10, *Area Designations for the 2010 Revised Primary Sulfur Dioxide National Ambient Air Quality Standards*, at 4 (Mar. 24, 2011) ("March 2011 Guidance").

[54] EPA's Updated Guidance at 2.

[55] Letter from Janet G. McCabe, Acting Assistant Adm'r, EPA Office of Air & Radiation, to Bryan W. Shaw, Chairman, TCEQ (Mar. 20, 2015) ("March 2015 Letter").

Monticello, and Sandow.[56] EPA said it intended to designate areas as nonattainment, unclassifiable/attainment,[57] or unclassifiable using the most recent available information.[58]

On September 18, 2015, TCEQ responded to EPA's letter, reaffirming its previous submittal providing for a designation of attainment for counties with certified monitoring data showing no violations and unclassifiable/attainment designations for the remainder of the state.[59] TCEQ emphasized that it "continue[d] to support the use of ambient air monitoring data as the appropriate information for use in making designation decisions" and, accordingly, sought to designate counties in Texas as either attainment based on monitoring data or unclassifiable/attainment where there were no monitors.[60] TCEQ stressed that monitoring data "is necessary for accurate characterization of actual air quality for attainment and nonattainment designations."[61]

On February 11, 2016, EPA notified TCEQ of EPA's preliminary intentions regarding the designations submitted by TCEQ.[62] For areas around the three Luminant's power plants at issue here, EPA modified all of TCEQ's designations and proposed to designate as nonattainment parts of Freestone

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[56] *Id.* at 1-2.

[57] EPA stated in its Updated Guidance that "[w]hile states have and may continue to submit designations recommendations identifying areas as 'attainment,' the EPA expects to continue its traditional approach, where appropriate, of using a designation category of 'unclassifiable/attainment' for areas that the EPA determines meet the NAAQS. The EPA expects to reserve the category 'unclassifiable' for areas where the EPA cannot determine based on available information whether the area is meeting or not meeting the NAAQS or where the EPA cannot determine whether the area contributes to a violation in a nearby area." EPA's Updated Guidance at 5 n.7. EPA must apply the same caution to "nonattainment" designations as it is applying to "attainment" designations, particularly when relying on modeling data for designation purposes, and failing to do so is arbitrary.

[58] March 2015 Letter at 1.

[59] Letter from Bryan W. Shaw, Chairman, TCEQ, to Janet G. McCabe, Assistant Adm'r, EPA Office of Air & Radiation (Sept. 18, 2015) ("September 2015 Letter").

[60] *Id.* at 1.

[61] *Id.*

[62] Letter from Ron Curry, Reg'l Adm'r, Region 6, to Greg Abbott, Governor, Texas (Feb. 11, 2016).

and Anderson Counties; parts of Rusk, Gregg, and Panola Counties; and parts of Titus County, which are around Big Brown, Martin Lake, and Monticello, respectively.[63] These nonattainment designations were based on modeling conducted and submitted by Sierra Club.[64] EPA requested additional information from TCEQ regarding the intended designations by April 19, 2016, and published a Federal Register notice announcing a 30-day comment period for the public to provide input on EPA's intended designations.[65] TCEQ responded to EPA's proposed designations in a timely manner and made clear its preference for reliance on monitoring data and expressed concerns about EPA's reliance on third-party, non-peer reviewed modeling in its proposed designations.[66] Further, Luminant filed comments highlighting TCEQ's preference for monitoring and also identifying multiple errors in the Sierra Club modeling that EPA relied on for its proposed designations.[67] Nonetheless, EPA finalized its designations as proposed.[68]

On December 13, 2016, EPA published its final rule designating the three areas at issue here as nonattainment.[69] In the Texas Nonattainment Designations, EPA relied solely on Sierra Club's modeling of emissions from Luminant's power plants to make its nonattainment designations[70] despite TCEQ's preference for monitoring and extensive public comments showing inaccuracies in Sierra Club's modeling.

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63 *Id.* at 2.

64 EPA, *Draft Technical Support Document: Texas Area Designations for the 2010 SO2 Primary National Ambient Air Quality Standard*, at 145-200 (Feb. 11, 2016) ("Draft Texas TSD").

65 81 Fed. Reg. 10,563 (Mar. 1, 2016).

66 Letter from Bryan W. Shaw, Chairman, TCEQ, to Janet G. McCabe, Assistant Adm'r, EPA Office of Air & Radiation, and Ron Curry, Reg'l Adm'r, EPA Region 6 (Apr. 19, 2016) ("April 2016 Letter").

67 Comments of Luminant on Proposed Texas Nonattainment Designations, Dock. ID No. EPA-HQ-OAR-2014-0464-0328 (Mar. 31, 2016).

68 81 Fed. Reg. at 89,873.

69 *Id.*

70 *See generally* EPA, *Technical Support Document for the Designation Recommendations for the 2010 Sulfur Dioxide National Ambient Air Quality Standards (NAAQS) – Supplement for Four Areas in Texas Not Addressed in June 30, 2016, Version* (Nov. 29, 2016) ("Texas TSD").

Following the issuance of the Texas Nonattainment Designations, TCEQ and Luminant each filed petitions for reconsideration of the rule informing EPA of, among other things, TCEQ's deployment of additional air quality monitors around the areas at issue and of Luminant's retirement of its Monticello Plant and Big Brown Plant in the relevant areas.[71]

Moreover, both TCEQ and Luminant filed petitions for review of the Texas Nonattainment Designations in the Fifth Circuit on February 13, 2017.[72] On March 24, 2017, EPA filed a motion to dismiss TCEQ's and Luminant's petitions for review of the Texas Nonattainment Designations or transfer the petitions to the D.C. Circuit Court of Appeals, arguing that the D.C. Circuit was the only proper forum to challenge the Texas Nonattainment Designations.[73] TCEQ and Luminant opposed EPA's motion, and briefing and oral argument were held before the Fifth Circuit on the issue. On August 25, 2017, the Fifth Circuit denied EPA's motion to dismiss or transfer, finding that the Texas Nonattainment Designations were "locally or regionally" applicable and explaining that it was "not convinced that the [Texas Nonattainment Designations were] based on determinations of nationwide scope or effect."[74]

On September 21, 2017, EPA responded to Luminant's petition for reconsideration and explained its intent to undertake administrative action to revisit the three areas at issue.[75] In light of its intention to revisit the Texas Nonattainment Designations, on October 2, 2017, EPA filed a motion to hold in abeyance the litigation challenging the rule in the Fifth Circuit.[76] The Fifth Circuit granted that motion, and TCEQ

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[71] Luminant's Petition for Reconsideration, Dock. ID No. EPA-HQ-OAR-2014-0464-0446 (Feb. 13, 2017); TCEQ's Petition for Reconsideration, Dock. ID No. EPA-HQ-OAR-2014-0464-0452 (Dec. 11, 2017).

[72] *Texas et al. v. EPA*, No. 17-60088 (5th Cir. Feb. 13, 2017).

[73] Mot. to Dismiss, *Texas v. EPA*, No. 17-60088 (5th Cir. Mar. 24, 2017).

[74] *Texas v. EPA*, No. 17-60088, 706 Fed. Appx. 159, 165 (5th Cir. Aug. 25, 2017).

[75] Letter from E. Scott Pruitt, Adm'r, EPA, to Daniel J. Kelly, Vice President & Assoc. General Counsel, Vistra Energy (Sept. 21, 2017).

[76] Mot. for Abeyance, *Texas v. EPA*, No. 17-60088 (5th Cir. Oct. 2, 2017).

and Luminant's petitions for review of the Texas Nonattainment Designations remain pending before the Fifth Circuit. On August 22, 2019, EPA proposed the error correction here to address the nonattainment designations for the three areas in Texas.[77]

## III. EPA Is Correct that the Texas Nonattainment Designations Erred in Failing to Give Appropriate Weight to Texas's Preference to Use Monitoring in $SO_2$ NAAQS Designations

As discussed above, the Clean Air Act utilizes a system of cooperative federalism, and the states are given primary authority over the implementation of the NAAQS. The states' authority includes the authority to put forth designations for the NAAQS. And as EPA has previously explained, the Clean Air Act "gives EPA the power to modify a state's designation only to the extent 'necessary,' thereby establishing a deferential standard for EPA disposition of a state choice."[78] Further, the D.C. Circuit and EPA have both recognized that the Clean Air Act "gives great deference to governors' recommendations for areas within their states, providing only that EPA '*may*' make any modifications it 'deems necessary.'"[79] Because it was not "necessary" for EPA to modify Texas's designations, EPA acted beyond its authority and its nonattainment designations were in error.

### A. Texas Clearly Stated Its Preference to Use Monitoring for Its $SO_2$ NAAQS Designations

TCEQ established a clear and consistent preference for the use of monitoring data in $SO_2$ NAAQS designations, which the Texas Nonattainment Designations ignored. Dating back to 2011, TCEQ maintained that "monitoring is required to determine attainment status . . . ."[80] TCEQ continued to make clear its preference for monitoring throughout the $SO_2$ NAAQS designation process. For example, in its September 18, 2015, letter to EPA, TCEQ said it "continue[d] to support the use of ambient air monitoring

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[77] 84 Fed. Reg. at 43,757.

[78] 52 Fed. Reg. 49,408, 49,410 (Dec. 31, 1987).

[79] *Pa. Dep't of Envtl. Prot. v. EPA*, 429 F.3d 1125, 1129 (D.C. Cir. 2005) (citing 42 U.S.C. § 7407(d)(1)(B)(ii)) (emphasis in original).

[80] Comments of TCEQ on EPA's Guidance for 1-Hour $SO_2$ NAAQS SIP Submissions, Dock. ID No. EPA-HQ-OAR-2010-1059-0034, at 3 (Dec. 2, 2011); *see also id.* at 5, 8, 10.

data as the appropriate information for use in making designation decisions."[81] Further, TCEQ "recommend[ed] that counties in Texas be designated . . . unclassifiable/attainment where there are no monitors" because "[m]onitoring data is necessary for accurate characterization of actual air quality for attainment and nonattainment designations."[82] Later, in its response to EPA's proposed designations, TCEQ highlighted that "[a] designation of nonattainment has serious consequences to industry, the economy of an area, its citizens, and the state," and, therefore, "[n]onattainment designations should only be made based on data from 40 CFR Part 58 compliant (regulatory) monitoring showing a violation of the standard."[83] Despite TCEQ's clear statements, EPA unlawfully ignored TCEQ's preference for monitoring and did not give TCEQ's designations appropriate deference.

### B. Texas's Preference for Monitoring Was Appropriate and Consistent with EPA's Own Guidance and Prior Practice

Moreover, TCEQ's preference for monitoring was consistent with EPA's own guidance. Until its abrupt change in the Consent Decree, EPA had consistently supported monitoring over modeling for designation purposes. In promulgating the 2010 $SO_2$ NAAQS, EPA stated that compliance with the NAAQS should be determined "based on 3 years of complete, quality assured, certified monitoring data."[84] However, because of the burdens and costs associated with implementing EPA's proposed monitoring network, EPA said it was breaking from its traditional approach to designations and *allowing* for the use of modeling *in addition to monitoring* to determine designations.[85] EPA stated that modeling could be used where insufficient monitoring data was available and anticipated that many areas would initially be

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81 September 2015 Letter at 1.

82 *Id.*

83 April 2016 Letter at 2.

84 75 Fed. Reg. at 35,569.

85 *Id.* at 35,570.

designated unclassifiable because of the lack of ambient monitoring data.[86] In other words, modeling was intended to provide an opportunity for states to avoid the cost and resources associated with siting, installing, and maintaining monitors where the state preferred to rely on modeling.

When EPA released its Strategy Paper in 2013, EPA confirmed that "the starting point for future $SO_2$ designations should be, as with other NAAQS, a monitoring network to adequately characterize air quality in areas of concern."[87] Monitors reflect actual air quality more accurately than any hypothetical model can. EPA again said it was *allowing* agencies to use modeling to characterize actual air quality around a source or source region "as a surrogate for ambient monitoring" "where monitoring is impractical."[88]

Moreover, EPA has consistently relied on monitoring data when making initial designations for other pollutants regulated under the NAAQS program. As EPA acknowledged in the final DRR: "[i]t is true that past area designations processes for most NAAQS (such as for ozone) . . . have relied primarily on air quality monitoring data to identify areas that violate the standard."[89] In 2013, for example, EPA instructed states to base designations for a revised NAAQS for $PM_{2.5}$ on monitoring.[90] Similarly, in 2012, EPA relied on monitored air quality in making initial designations for revised ozone NAAQS.[91] In 2010, EPA determined that it should rely on monitoring data in the area designation process for the 1-hour nitrogen dioxide ($NO_2$) NAAQS. In that case, because the monitoring network for $NO_2$ was not sufficient

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86 *Id.* at 35,570-71.

87 *See* Strategy Paper at 2.

88 *Id.* EPA explains in its Strategy Paper that it is merely allowing modeling in the $SO_2$ NAAQS context because of the limited monitoring network that existed at the time the new $SO_2$ NAAQS limit was set and the expense of establishing new monitoring sites. *Id.*

89 80 Fed. Reg. at 51,057.

90 *See* Memorandum from Gina McCarthy, Assistant Adm'r, EPA Office of Air & Radiation, to Reg'l Adm'rs, EPA Regions 1-10, at 2 (Apr. 16, 2013).

91 *See* 77 Fed. Reg. 30,088, 30,091 (May 21, 2012).

to determine whether areas attained the new 1-hour $NO_2$ NAAQS, EPA designated the entire country as "unclassifiable/attainment" until a sufficient monitoring network could be established.[92] It was not until the Consent Decree that EPA sought to change course and *require* modeling for the State of Texas.

In sum, EPA has been clear that monitoring data is preferred for NAAQS designations, and EPA's offer for states to use modeling for the $SO_2$ NAAQS was simply intended to provide states with another option. EPA's approach in the Texas Nonattainment Designations to *require* modeling and rely solely on that data for designations was inconsistent with the statute and EPA's prior practice and did not give appropriate deference to Texas's stated preference. Moreover, as discussed below, the only lawful and supportable designation for the areas at issue was unclassifiable; therefore, it was plainly not "necessary" for EPA to modify Texas's designations and such action was beyond EPA's statutory authority. Accordingly, Luminant supports EPA's proposal to correct this error.

## IV. EPA Is Correct that It Erred in Relying on Sierra Club's Flawed Modeling to Support Its Designations

In addition to the Texas Nonattainment Designations' error in disregarding Texas's preference for monitoring, EPA also erred in relying on Sierra Club's biased, flawed, and unreliable dispersion modeling for the nonattainment designations. EPA found multiple flaws with Sierra Club's modeling for Texas when discussing both its proposed and final nonattainment designations. In the proposal, EPA noted errors including significant errors in stack configuration, AERMOD model versions, and process parameters, such as the failure to account for hourly varying temperatures and flows.[93] Further, in the final rule, EPA highlighted that it "d[id] *not agree* with [some of] Sierra Club's assertion[s],"[94] and it conceded that Sierra

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92 *See* 77 Fed. Reg. 9,532, 9,535, 9,537-88 (Feb. 17, 2012).

93 *See generally* Draft Texas TSD.

94 Texas TSD at 17, 39, 61 (emphasis added).

Club's modeling was "not peer-reviewed"[95] and did not use building downwash or variable stack temperatures for the analyses of Luminant's plants[96] among other errors, and only "generally meets the requirements" of EPA's modeling guidance.[97] Nonetheless, the Texas Nonattainment Designations relied on the Sierra Club modeling as the basis for the nonattainment designations.

EPA's use of Sierra Club's modeling for Texas was an aberration and an outlier. EPA has consistently rejected Sierra Club's modeling for other areas in other states, often due to the same errors that arose in Sierra Club's Texas modeling. In fact, in EPA's first round of designations under the Consent Decree, EPA found that Sierra Club's (and other environmental group's) modeling was insufficient to "clearly demonstrate" nonattainment where it contradicted the relevant state's designation in nearly every other scenario.[98] For example, for Gibson County, Indiana, EPA found that Sierra Club's modeling was not sufficiently credible to support a nonattainment designation because it did not consider "building wake effects, i.e., downwash."[99] In assessing the impact of this flaw, EPA explained that "[p]ut simply: building downwash can have a significant impact on where maximum concentration values might

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95 EPA, *Responses to Significant Comments on the Designation Recommendations for the 2010 Sulfur Dioxide National Ambient Air Quality Standards (NAAQS) – Supplement for Four Areas in Texas Not Addressed in June 30, 2016*, at 17 (Nov. 29, 2016).

96 *Id.* at 29-30, 34.

97 *Id.* at 40.

98 *See, e.g.*, EPA, *SO2 Designations – Round 2 State Recommendations and EPA Responses*, https://www.epa.gov/sulfur-dioxide-designations/so2-designations-round-2-state-recommendations-and-epa-responses (Draft Technical Support Documents for Arkansas, Colorado, Georgia, Illinois, Indiana, Kansas, Michigan, Missouri, Nebraska, Ohio, Texas); EPA, *EPA Completes Second Round of Sulfur Dioxide Designations* (June 30, 2016), https://www.epa.gov/sulfur-dioxide-designations/epa-completes-second-round-sulfur-dioxide-designations (Final Technical Support Documents for Arkansas, Colorado, Georgia, Illinois, Indiana, Kansas, Louisiana, Michigan, Missouri, Nebraska, Ohio ("[State] TSD")). EPA accepted Sierra Club's modeling and suggested designation for Williamson County, Illinois; however, EPA has since reconsidered and revised this designation from nonattainment to attainment/unclassifiable. 84 Fed. Reg. 48,286 (Sept. 13, 2019).

99 Indiana TSD at 13.

occur."[100] For the Independence Station in Arkansas, EPA's review of Sierra Club's modeling indicated that Sierra Club's modeling "was premised on several factors that [were] inconsistent with refinements provided for in the modeling [technical assistance document]," such as Sierra Club's failure to "include variable stack velocity and temperature" data.[101] As EPA acknowledged, similar errors were made in Sierra Club's modeling that was used for the Texas Nonattainment Designations. The Texas Nonattainment Designations provided no clear reason why the flaws in Sierra Club's modeling disqualified it in nearly every other scenario but was sufficient to "clearly demonstrate" nonattainment for the three areas at issue in Texas. As EPA itself recognized, the results of Sierra Club's modeling for Texas were flawed, and, therefore, they should have been "reasonably consider[ed] to be unsound."[102]

Moreover, Sierra Club's modeling was not entitled to deference and should not have formed the basis for the Texas Nonattainment Designations. EPA has historically rejected third-party data in making NAAQS designations, and the D.C. Circuit confirmed such an approach by EPA is appropriate.[103] Specifically, in *Mississippi Commission on Environmental Quality v. EPA*, where the D.C. Circuit reviewed EPA's designations for the 2008 Ozone NAAQS, the D.C. Circuit rejected the idea that privately collected data was as good as that gathered through the regulatory process.[104] Ultimately, the D.C. Circuit upheld EPA's decision to "reasonably decline[] to rely on data that it considered of insufficient quality for designations purposes."[105] Similarly, in the Texas Nonattainment Designations it was inappropriate to

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[100] *Id.*

[101] Arkansas TSD at 5.

[102] *Miss. Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138, 154 (D.C. Cir. 2015).

[103] *Id.* at 156.

[104] *Id.* at 155 ("Accepting [this] argument would require us to conclude that the EPA must apply *less stringent* post-collection validation requirements to data collected from private monitors in 'substantial compliance' with the agency's data-collection regulations than the agency applies to data collected from regulatory monitors in *actual* compliance with those regulations." (emphasis in original)).

[105] *Id.* at 156.

base nonattainment designations on Sierra Club's non-peer reviewed and error-ridden modeling. Accordingly, Luminant supports EPA's proposal here to find that its prior reliance on Sierra Club's modeling was in error and must be corrected.

## V. The Texas Nonattainment Designations Were Unlawful and Must Be Corrected

EPA must correct the Texas Nonattainment Designations because they were unlawful. The Clean Air Act establishes a clear regime for states and EPA to follow in determining the proper NAAQS designation. As discussed above, if, at the time the state makes its designations, "any area [] cannot be classified on the basis of available information as meeting or not meeting [the NAAQS]," the state "shall" designate that area as "unclassifiable."[106] The unclassifiable designation was added to the Clean Air Act to provide regulatory certainty for situations where, as here, an area does not clearly fall into the "attainment" or "nonattainment" category. As EPA acknowledged in promulgating the 2010 $SO_2$ NAAQS:

> The absence of monitoring data showing violations for most areas, combined with the paucity of refined modeling of sources that have the potential to cause or contribute to violations of the NAAQS, will likely result in informational records that are insufficient to support initial designations of either "attainment" or "nonattainment" . . . . [I]n such a situation EPA is required to issue a designation for the area as "unclassifiable."[107]

The legislative history of Section 107(d) makes clear that the purpose of an unclassifiable designation was to accommodate situations where a source does not clearly fall into the "attainment" or "nonattainment" category. Specifically, the 1977 amendments to the Clean Air Act added the unclassifiable designation for areas that "cannot be classified" as attainment or nonattainment,[108] particularly for the purpose of avoiding questionable nonattainment designations in the case of uncertainty.

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[106] 42 U.S.C. § 7407(d)(1)(A)(iii).

[107] 75 Fed. Reg. at 35,571 (emphasis added).

[108] *See* S. Rep. No. 95-127, at 3 (1977); Pub. L. No. 95-95, 91 Stat. 685 (1977).

For this reason, courts have upheld unclassifiable designations when sufficient data is lacking to make an informed designation decision. As discussed above, in *Mississippi Commission on Environmental Quality*, various parties challenged EPA's 2013 designation of certain areas as "unclassifiable" for the 2008 ozone NAAQS.[109] Despite third-party data indicating exceedances of the NAAQS, EPA designated the area "unclassifiable" because there was uncertainty surrounding the limited data available at the time.[110] The court agreed that EPA is not required to rely on data "reasonably consider[ed] to be unsound" to designate an area attainment or nonattainment; instead, a designation of "unclassifiable" would be appropriate.[111] Thus, an unclassifiable designation is appropriate "if the area 'permit[s] no determination given existing data.'"[112]

In light of this functional role for the unclassifiable designation, EPA stated with respect to the new $SO_2$ NAAQS that all areas that were not designated "attainment" or "nonattainment," "including those with $SO_2$ monitors showing no violations but without modeling showing no violations, would be designated as 'unclassifiable.' Areas with no $SO_2$ monitors at all, *i.e.*, 'rest of State,' would be designated as 'unclassifiable' as well."[113] Similarly, EPA's guidance documents for implementing the $SO_2$ NAAQS clearly contemplated an initial designation of unclassifiable to provide states sufficient additional time to collect the data needed to make supportable designations.[114]

Moreover, in its Technical Support Document for Texas, EPA stated that a "[d]esignated nonattainment area" is "an area which the EPA **has determined is violating** the 2010 $SO_2$ NAAQS or

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109 *Miss. Comm'n on Envtl. Quality*, 790 F.3d at 154.

110 *Id.* at 156.

111 *Id.* at 154.

112 *Id.* at 145 (quoting *Catawba Cnty., NC v. EPA*, 571 F.3d 20, 26 (D.C. Cir. 2009)) (alteration in original).

113 75 Fed. Reg. at 35,569 (emphasis added).

114 March 2011 Guidance at 2; Strategy Paper at 6.

contributes to a violation in a nearby area."[115] Similarly, in its updated guidance, EPA defined an area as "nonattainment" if it "is violating" the NAAQS.[116] EPA could make no such determination for the areas at issue here. The only monitoring data available at the time of the designations showed attainment of the standard. Further, the flaws identified with Sierra Club's modeling confirmed that the modeling was unreliable and insufficient to inform designations of attainment or nonattainment. Because of all the factors that influence modeling, the modeling results in this case could not "clearly demonstrate" that a nonattainment designation was warranted and should not be relied on for such purposes. Accordingly, as EPA correctly now recognizes in the Proposed Rule, "EPA could not determine based on available information" for the areas at issue whether those areas "were meeting or not meeting the 2010 $SO_2$ NAAQS," and a designation of unclassifiable was required.[117] Luminant supports EPA's proposal to correct its errors and make the requisite designations of unclassifiable for these areas.

## VI. Unclassifiable Designations Were the Only Lawful Option in Light of the Consent Decree and the DRR

Additionally, designations of unclassifiable were the only legally supportable option in light of the Consent Decree and the DRR. As noted above, in entering the Consent Decree, the court made clear that nothing in the Consent Decree required any particular outcome with respect to $SO_2$ NAAQS designations.[118] Rather, the Consent Decree merely mandated an accelerated designation schedule for larger sources of $SO_2$ in the country. It did not and could not require EPA to make any particular designation or compel EPA to accept Sierra Club's flawed modeling. This was confirmed by the DRR, which EPA finalized shortly after the entry of the Consent Decree. In the final DRR, EPA specifically

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[115] *See* Texas TSD at 6 (emphasis added).

[116] EPA's Updated Guidance at 4 (emphasis added).

[117] 84 Fed. Reg. at 43,762.

[118] As the district court stated in its order granting the Consent Decree, "the appropriate remedy in a 'deadline' case such as this is to require EPA to issue designations pursuant to a schedule, not to mandate that EPA issue any particular designation." *Sierra Club,* 2015 WL 889142, at *11.

recognized that monitoring requirements for implementing the NAAQS do not always generate new information in time to inform timely area designations under Clean Air Act section 107.[119] EPA explained that the unclassifiable designation remains a valid option because monitoring data could be utilized, whether "EPA promulgates initial designations of 'unclassifiable' (and then uses the information collected pursuant to this data requirements rule in later re-designations), or whether the EPA promulgates the remaining designations after the information required here becomes available . . . ."[120]

Moreover, EPA's final DRR made clear that the agency's intent to use an unclassifiable designation until "data to support more properly informed future judgments regarding areas' attainment status" was appropriate.[121] Otherwise, areas with the largest sources of $SO_2$ emissions—those required to be designated in the first round under the Consent Decree—would arbitrarily be treated differently than all other areas of the country in violation of Section 107(d) of the Clean Air Act. Accordingly, for sources affected by the first deadline in the Consent Decree, EPA should have designated an area as unclassifiable where data was insufficient, including cases where monitoring data was lacking. Such an approach, which would have allowed states to rely on monitoring as they wished, was the only lawful approach in light of the Consent Decree and the DRR. It was clear that neither the court nor EPA intended for the Consent Decree or the DRR to foreclose a state's ability to rely on monitoring to support its designations. Accordingly, EPA's proposal to designate the areas at issue unclassifiable until monitors can acquire three years of data to accurately characterize air quality was and is the only lawful path forward.

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[119] 80 Fed. Reg. at 51,056 (citing 75 Fed. Reg. 81,126, 81,130 (Dec. 27, 2010) (monitoring requirements for new lead NAAQS)).

[120] *Id.*

[121] *Id.* at 51,083.

## VII. EPA's Proposed Rule Is an Appropriate Approach to Correcting the Unlawful Texas Nonattainment Designations

EPA's proposal to use its authority under Section 110(k)(6) to address the unlawful designations promulgated in the Texas Nonattainment Designations is appropriate. Section 110(k)(6) provides that:

> Whenever the Administrator determines that the Administrator's action . . . promulgating any . . . area desgination . . . was in error, the Administrator may in the same manner as the . . . promulgation revise such action as appropriate without requiring any further submission from the State.[122]

As courts have explained, "Section 110(k)(6) confers discretion on the EPA to decide if and when it will invoke the statute to revise a prior action."[123] Such an approach is appropriate so long as EPA "articulate[s] an 'error' and provide[s] 'the basis' of its determination that an error occurred."[124] EPA has satisfied these requirements here. As discussed above and as EPA details in its Proposed Rule, EPA erred in multiple ways in the Texas Nonattainment Designations. First, EPA erred by not providing appropriate deference to TCEQ's preference to rely on monitoring data in making designations for the $SO_2$ NAAQS.[125] Second, EPA erred by relying on Sierra Club's non-peer reviewed and inaccurate modeling as the basis for the designations at issue here.[126]

Further, EPA's Proposed Rule details its basis for determining it erred in promulgating the Texas Nonattainment Designations.[127] Additionally, EPA is proposing to revise its action and correct such errors "in the same manner" as its original promulgation—through notice and comment rulemaking.[128] Lastly,

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122 42 U.S.C. § 7410(k)(6).

123 *Ala. Envtl. Council v. EPA*, 711 F.3d 1277, 1287 (11th Cir. 2013).

124 *Id.*

125 84 Fed. Reg. at 43,760-61.

126 *Id.* at 43,761.

127 *Id.* at 43,760-61.

128 *See Ass'n of Irritated Residents v. EPA*, 790 F.3d 934, 949 (9th Cir. 2015) (determining that "in the same manner" is a procedural requirement).

EPA's proposal to correct its errors and classify the relevant areas as "unclassifiable" is "appropriate" under Section 110(k)(6) because designations of unclassifiable or unclassifiable/attainment are the only "appropriate" and legally supportable designations for the areas at issue here, as discussed above in Sections V and VI. In fact, if not for the error correction provision of Section 110(k)(6), EPA would be required to repeal the Texas Nonattainment Designations because they were arbitrary and capricious and cannot be upheld under the law. However, Luminant believes that the error correction provision of Section 110(k)(6) is an appropriate mechanism to address the unlawful designations put forth in the Texas Nonattainment Designations, and, accordingly, Luminant supports EPA's Proposed Rule.[129]

## VIII. EPA Correctly Did Not Make a Finding That Its Texas-Only Proposal Is Based on a Determination of Nationwide Scope or Effect

The Proposed Rule is a locally or regionally applicable action for purposes of judicial review, as were the Texas Nonattainment Designations.[130] The Proposed Rule, "on its face[,] regulates entities and conduct in a single state" and only has legal effect in the State of Texas.[131] Specifically, the Proposed Rule removes the obligation for Texas to develop a nonattainment SIP or, alternatively, for EPA to develop a FIP for Texas. The Proposed Rule has no impact on any other state beyond Texas. Moreover, the Proposed Rule is based on "all available information" with respect to only the three areas at issue in Texas and relies entirely on *Texas's* preference for monitoring and EPA's assessment of Sierra Club's *Texas-*

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[129] Although Luminant supports EPA's proposal, EPA must make clear that Texas is not under an obligation to submit a nonattainment SIP for the areas identified in this Proposed Rule. Such an approach "enable[s EPA] to fix its mistake in light of the particular circumstances and goals of the CAA." *Id.* at 951; *see also Ethyl Corp. v. Browner*, 67 F.3d 941, 945 (D.C. Cir. 1995) (using *nunc pro tunc* order to require retroactive effectiveness of EPA action to ensure a complete remedy for Petitioner).

[130] 42 U.S.C. § 7607(b)(1).

[131] *Texas*, 706 Fed. Appx. at 164.

*specific* modeling.[132] Thus, the action is "locally or regionally applicable" under the Clean Air Act's judicial review provision.[133]

Moreover, EPA correctly did not make a finding that this action "is based on a determination of nationwide scope or effect." For the purposes of the Clean Air Act's venue provision, "'the relevant determinations are those that lie at the core of the agency action,' not determinations that are 'peripheral or extraneous.'"[134] "Determinations are not of nationwide scope or effect if they are 'intensely factual determinations such as those related to the particularities of the emissions sources in Texas.'"[135] And, even if concepts or interpretations from the proposed action are applied in later rulemakings, that is irrelevant to the venue inquiry, because it is "typical" for "the interpretative reasoning offered by [EPA] . . . [to have] precedential effect in future EPA proceedings . . . , including regionally and locally applicable ones."[136] Such precedential effect does not transform the action into one that is "based on a determination of nationwide scope or effect." Rather, if EPA later relies on a concept or "interpretation set forth in the [action] in . . . other final agency action, it will be subject to judicial review upon challenge" to that separate action.[137]

Here, the Proposed Rule relied on the specific circumstances associated with its nonattainment designations for the three areas at issue here. Specifically: (1) Texas's preference to rely on monitoring data to make designations for the areas at issue; and (2) flaws in Sierra Club's modeling for the specific

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[132] 84 Fed. Reg. at 43,760.

[133] *Texas*, 829 F.3d at 419 ("The question of applicability turns on the legal impact of the action as a whole.").

[134] *Texas*, 706 Fed. Appx. at 164 (quoting *Texas*, 829 F.3d at 419).

[135] *Id.* (quoting *Texas*, 829 F.3d at 421).

[136] *Sierra Club v. EPA*, 926 F.3d 844, 850 (D.C. Cir. 2019); *see also Texas*, 829 F.3d at 423 ("Nor are we persuaded . . . that whatever precedential effect the Final Rule has shows that it is based on determinations with nationwide scope or effect.").

[137] *Sierra Club*, 926 F.3d at 849.

areas in Texas at issue in this rulemaking. For the factual circumstances on which EPA's Proposed Rule is based, namely whether "all available information" with respect to the three areas at issue supported a nonattainment designation, EPA's Proposed Rule finds that it "could not determine . . . whether the three Texas areas that are the subject of this proposed action were meeting or not meeting the 2010 $SO_2$ NAAQS."[138] Therefore, EPA made its determination to correct its errors in the Texas Nonattainment Designations by assessing the specific circumstances that resulted in the nonattainment designations and undertaking a solely Texas-specific inquiry. Thus, just like EPA's initial promulgation of the Texas Nonattainment Designations, the action here is locally or regionally applicable, and EPA properly did not make a finding that the Texas-specific action is based on a determination of nationwide scope or effect.

## IX. Conclusion

EPA's Proposed Rule properly recognizes that EPA erred in the Texas Nonattainment Designations. Accordingly, Luminant supports the Proposed Rule and encourages EPA to finalize the proposal.

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[138] 84 Fed. Reg. at 43,761-62.